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CITATIONS

596606—44

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 105

DAVID W. WALLACE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 32–36) is reported in 50 F. Supp. 178. The opinion of the District Court upon the motion to restore the case to the calendar (R. 26–27) is not officially reported. The opinion of the Circuit Court of Appeals (R. 51–57) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 4, 1944 (R. 58). The petition for a writ of certiorari was filed May 27, 1944.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The District Court dismissed this case for lack of prosecution on May 13, 1938. On November 4, 1940, the plaintiff, who is the petitioner here, filed a motion to restore the case to the calendar, alleging that the failure to prosecute was due to the inadvertence and neglect of counsel. The question is whether the District Court's order of February 14, 1941, vacating its previous order of dismissal and restoring the case to the calendar, was authorized under the Rules of Civil Procedure.

RULES INVOLVED

The applicable rules are set forth in the Appendix, *infra,* pp. 10–12.

STATEMENT

This suit was brought on October 14, 1933 (R. 1), for the recovery of alleged overpayment of the petitioner's income tax for 1929 (R. 3–6). The United States filed an answer on January 24, 1934 (R. 1), joining issue with respect to the petitioner's right to recover (R. 6–7). The case was noticed for trial by counsel for the petitioner, and continued to be so noticed from March 1934 to November 1937 (R. 8, 12). Upon the call of

the calendar on November 9, 1937, when the case was reached, counsel for the petitioner did not appear (R. 8–9, 13). The court thereupon dismissed the case upon motion of Government counsel, and a formal order of dismissal for lack of prosecution was entered on May 13, 1938 (R. 7–8, 13).

Thereafter, on November 4, 1940, the petitioner filed a motion to restore the case to the calendar under Rule 16 of the Rules of the District Court for the Western District of New York (R. 9–10; *infra,* p. 12). His former counsel filed a supporting affidavit which stated in substance that, due to the press of his duties as State Senator, the case was allowed to be dismissed because of his inadvertence and neglect (R. 10–11). The Government opposed the motion on the ground that seven years had elapsed since the suit was begun, without any action towards trial of the case (R. 11–14). A reply affidavit by counsel for the petitioner asserted that the delay up to March 9, 1936, was caused by the pendency before the Board of Tax Appeals of a similar controversy involving the 1930 income tax liability of a partner of the petitioner, and that such proceeding was not concluded until 1936 (R. 14–17).

On February 14, 1941, the District Court set aside its previous order of dismissal (R. 17–18). On August 5, 1941, the Government moved to vacate the order restoring the case to the calendar

(R. 19–22). In a responsive affidavit, counsel for the petitioner stated that the United States Attorney had consented to the restoration of the case provided the facts were stipulated so that the case could proceed to an early trial; that the parties had entered into such a stipulation; and that the case was ready for trial (R. 23–25). The District Court denied the Government's motion (R. 26–27). When the case came on for trial on December 16, 1942, the Government renewed its motion for dismissal on the ground that the order of February 14, 1941, was invalid (R. 31–32). In denying this motion, the District Court stated that counsel for the Government consented to the February 14, 1941, order (R. 33). The case was then tried on the merits, and resulted in a judgment for the petitioner in the amount of $4,419.35, plus interest (R. 39–40).

Upon appeal to the Circuit Court of Appeals for the Second Circuit, the judgment below was reversed on the ground that Rule 60 (b) of the Federal Rules of Civil Procedure (*infra*, pp. 10–11) requires that a motion to relieve a party from any order taken against him through his mistake, inadvertence, surprise, or excusable neglect must be made within six months after such order; that the order of February 14, 1941, vacating the dismissal order of May 13, 1938, was therefore invalid, and the District Court was without jurisdiction to proceed further; and that the consent of Government

counsel to the entry of the order of February 14, 1941, was ineffectual to waive the statute of limitations (R. 55–57). Judge A. N. Hand concurred in the result (R. 57).

ARGUMENT

1. The court below correctly held that under Rule 60 (b) of the Rules of Civil Procedure the District Court could not on February 14, 1941, vacate its order of May 13, 1938, dismissing the suit for lack of prosecution. The petitioner contends that the express six-months' limitation contained in Rule 60 (b) upon the granting of relief from orders entered through mistake, inadvertence, surprise, or excusable neglect, is qualified by the general provisions of Rule 6 (b), which reads as follows:

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect; but it may not enlarge the period for taking any action under Rule 59, except as

> stated in subdivision (c) thereof, or the period for taking an appeal as provided by law.

The lower federal courts have generally held in accord with the decision below, however, that the specific six-months' limitation of Rule 60 (b) cannot be enlarged under Rule 6 (b). See *Nachod & United States Signal Co.* v. *Automatic Signal Corp,* 32 F. Supp. 588, 589 (D. Conn.); *McGinn* v. *United States,* 2 F. R. D. 562 (D. Mass.); *Cavallo* v. *Agwilines, Inc.,* 2 F. R. D. 526 (S. D. N. Y.); but see *Schram* v. *O'Connor,* 2 F. R. D. 192 (E. D. Mich.).

The failure of the draftsmen of the Rules to provide expressly that Rule 6 (b) does not enlarge the time limit specified in Rule 60 (b) is explained by Professor Moore as follows:

> A comparison of Rule 60 (b) as promulgated with Rule 57 (b) of the April 1937 draft affords a probable explanation for the failure to include in the final clause of Rule 6 (b) the time provided for serving a motion for relief from a judgment. Rule 57 (b) of the April 1937 draft required that the motion be served before the expiration of the time for appeal. Hence, since Rule 6 (b) provided that the time for appeal could not be enlarged, it followed necessarily that the time for service of the motion for relief from a judgment could not be enlarged. Rule 60 (b) as promulgated, however, changed the time for serving the motion to a period in no case

> exceeding 6 months after the entry of judgment. Rule 6 (b) was not changed to harmonize with the change made in Rule 60 (b). The wording of Rule 60 (b) indicates that the draftsmen intended that the period for serving the motion should not be enlarged. Failure to make the appropriate changes in Rule 6 (b) was apparently an oversight and not intentional.

(1 Moore, Federal Practice (1938), p. 414, n. 1.)

The Advisory Committee on Rules for Civil Procedure has considered this question, and its *Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States,* submitted to the bench and bar in May 1944, invites consideration of two proposed amendments to Rule 6 (b), both of which would explicitly provide that the time limitations in various Rules, including 60 (b), could not be enlarged under Rule 6 (b). *Id.*, pp. 1–9. Since these proposed amendments to the Rules will eventually be submitted to this Court, we suggest that the question of the relationship of Rule 6 (b) to such other Rules may be more appropriately considered by the Court at that time rather than in the present proceeding.

2. The petitioner has conceded that, unless the February 14, 1941, order is valid, his claim is barred by the statute of limitations (R. 52). The

consent of counsel for the Government to the order restoring the case to the calendar is immaterial since, as the court below properly held (R. 53–55), an officer of the United States can not effectively waive the statute of limitations. *Munro* v. *United States,* 303 U. S. 36; *Finn* v. *United States,* 123 U. S. 227; *United States* v. *Nashville, etc., Ry. Co.,* 118 U. S. 120; cf. *United States* v. *Garbutt Oil Co.,* 302 U. S. 528, 534.

3. The court below correctly rejected the petitioner's contention that Rule 60 (b) is inapplicable here because his motion to restore the case to the calendar was "an action to relieve a party from a judgment, order, or proceeding," and hence expressly excepted from Rule 60 (b). As Professor Moore points out (3 Moore, Federal Practice (1938), pp. 3254–3276), the history of the exception clause clearly shows that it was intended to preserve the power of the court to grant extraordinary relief, notwithstanding expiration of the term, upon writs of error *coram nobis,* or bills of review or in the nature of bills of review, or upon independent suits based on fraud. But, as the court below held (R. 57), "The kind of relief Wallace sought here could not, before the Rules, have been accorded him in such ancillary proceedings, and he made no charge of fraud." Cf. *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.,* No. 398, Oct. Term 1943, decided May 15, 1944. Consequently, the petitioner's motion inescapably fell within the limitations imposed by Rule 60 (b).

CONCLUSION

It is respectfully submitted that the case was correctly decided by the court below; that no questions warranting further review are presented; and that the petition for a writ of certiorari should therefore be denied.

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JULY 1944.